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In the Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL, PETITIONER

v.

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR THE FEDERAL TRADE COMMISSION
AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an attorney's statement on his business letterhead that he is a "certified civil trial specialist by the National Board of Trial Advocacy" constitutes commercial speech.

2. Whether, if an attorney's truthful certification claim qualifies as commercial speech, the state can, consistent with the First Amendment, forbid it along with all other certification and specialization claims.

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INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission (Commission) enforces Section 5(a) of the Federal Trade Commission Act, which prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a), and other statutes that regulate unfair and deceptive practices in specific industries.¹ Because many of these regulated

¹ See, *e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (prohibiting misleading and harassing communications by debt collectors); Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* (regulating, among other speech, communications between credit reporting agencies and creditors regarding creditworthiness of consumers).

practices take the form of speech, and because commercial speech is " 'traditionally subject to governmental regulation,' " *Board of Trustees of the State Univ. of N.Y. v. Fox*, 109 S. Ct. 3028, 3035 (1989), the Commission's ability to implement its statutory mandate is vitally affected by the scope of the definition of "commercial speech" under the First Amendment.

In addition, in the years since this Court extended First Amendment protection to commercial speech in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), the Commission has worked to improve consumer access to truthful information about professional services by initiating antitrust enforcement proceedings,² by conducting studies about the effects of advertising by professionals, including attorneys,³ and by filing comments with state bar authorities on the regulation of attorney advertising.⁴ The Commission accordingly has a

² See, e.g., *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); *Rhode Island Board of Accountancy*, 107 F.T.C. 293 (1986); *Louisiana State Board of Dentistry*, 106 F.T.C. 65 (1985); *Montana Board of Optometrists*, 106 F.T.C. 80 (1985); *Michigan Ass'n of Osteopathic Physicians & Surgeons, Inc.*, 102 F.T.C. 1092 (1983); *American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd mem.* by an equally divided Court, 455 U.S. 676 (1982); *American Dental Ass'n*, 94 F.T.C. 403 (1979), *modified*, 100 F.T.C. 448 (1982), 101 F.T.C. 34 (1983).

³ See, e.g., Cleveland Regional Office and Bureau of Economics, FTC, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984).

⁴ See, e.g., Comments of the Staff of the Bureau of Competition of the Federal Trade Commission on the American Bar Association Model Rules of Professional Conduct (Nov. 23, 1988); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (Nov. 9, 1987); Comments of the Federal Trade Commission Staff on the

substantial interest both in preserving the government's authority to regulate commercial speech and in eliminating unnecessary restrictions on the flow of truthful information about professional legal services.

STATEMENT

Petitioner Gary E. Peel is an attorney licensed to practice law in Illinois, Arizona, and Missouri. Pet. App. 19a. In 1981, petitioner became certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy (NBTA). *Id.* at 30a. The NBTA was founded in 1977 to improve the quality of the trial bar and the delivery of legal services by providing a national credentialing process for trial lawyers. See NBTA Amicus Curiae Br. 4. Modeled after the medical profession's specialty certification boards, the NBTA certifies attorneys who meet specified standards of experience, ability, and concentration in trial advocacy.⁵

Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (Mar. 31, 1987).

⁵ According to the NBTA, certification as a civil trial specialist requires, among other conditions: (1) at least five years of actual practice in civil trial law during the period immediately preceding application for certification, of which at least thirty percent of professional time is spent in civil trial litigation; (2) participation as lead counsel in fifteen or more complete civil trials to verdict or judgment, including no fewer than 45 full days of trial and at least five jury trials and participation as lead counsel in at least forty additional contested proceedings involving the taking of testimony (e.g., trials, evidentiary hearings, depositions, or motions heard before or after trial); (3) participation in forty-five hours of continuing legal education in the specialty in the three year period preceding application; (4) provision of references by six attorneys not presently partners or associates of the candidate; and (5) successful completion of a day-long written examination. NBTA Amicus Curiae Br. 8-9.

Beginning in 1983, petitioner placed on his letterhead stationery, between his name and the States in which he is licensed to practice, the following statement: "Certified Civil Trial Specialist By the National Board of Trial Advocacy." Pet. App. 21a. On April 15, 1986, petitioner wrote to two clients on that stationery. Those clients—who were attorneys themselves involved in disciplinary proceedings before the respondent, the Administrator of the Attorney Registration and Disciplinary Commission of Illinois (ARDC)—submitted petitioner's letter as an exhibit to their submission to the ARDC in their disciplinary proceedings. Pet. 5. Upon noticing the statement of certification on petitioner's stationery, the Administrator, on April 9, 1987, filed a complaint with the Hearing Board of the ARDC. The complaint alleged, among other infractions,⁶ that the certification statement on petitioner's letterhead violated Disciplinary Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which provides that "no lawyer may hold himself out as 'certified' or a 'specialist.'"⁷

In response to the Administrator's complaint, petitioner asserted that "lawyer specialty advertising constitutes a

⁶ The one-count complaint alleged violations of three Disciplinary Rules: (1) Rule 1-102, which proscribes violating a Disciplinary Rule; (2) Rule 2-101(b), which prohibits false, misleading, or deceptive commercial publicity; and (3) Rule 2-105(a), which forbids lawyers other than patent, trademark, and admiralty lawyers from holding themselves out publicly as certified or as a specialist. Pet. App. 17a.

⁷ The rule provides that "[a] lawyer shall not hold himself out publicly as a specialist," except for lawyers engaged in the practice of patent, trademark, or admiralty law. The rule permits a lawyer or law firm to "specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice." With those exceptions, however, "no lawyer may hold himself out as 'certified' or a 'specialist.'" Pet. 2-3.

form of commercial free speech, protected by the first amendment." Pet. App. 22a-23a. Besides using his letterhead to correspond with clients, petitioner testified at his disciplinary hearing that he used his letterhead in communications with other attorneys, with the ARDC, and in the ordinary course of his law practice. *Id.* at 26a.

Following the hearing, on August 25, 1987, a panel of the ARDC Hearing Board found that petitioner had held himself out as being "certified" or as a "specialist" in violation of Disciplinary Rule 2-105(a) and recommended that petitioner be censured. Pet. App. 20a. The panel held that petitioner's certification representation was "'misleading' as our Supreme Court has never recognized or approved any certification process." *Ibid.* On February 12, 1988, the ARDC Review Board "concur[red]" with the hearing panel's decision and its recommendation that petitioner be censured. *Id.* at 16a.

On review, the Supreme Court of Illinois adopted the recommendation of the Review Board and censured petitioner. Pet. App. 15a. The court explained that petitioner's certification claim was "decep[tive] and confus[ing]" for two reasons. *Id.* at 9a. First, by stating that petitioner was certified by the NBTA, "the general public could be misled to believe that [petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA." *Ibid.* The fact that the certification claim on petitioner's letterhead was positioned directly above the list of States in which petitioner was licensed to practice law added to the possibility of confusion, because "[t]he letterhead contain[ed] no indication that licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter." *Ibid.* For this reason, the court concluded, "the claim of certification by the NBTA

impinge[d] upon the sole authority of this court to license attorneys in this State and [wa]s misleading because of the similarity between the words 'licensed' and 'certified.' " *Ibid.* Second, the court found petitioner's certification statement misleading because it "tacitly attest[ed] to the qualifications of [petitioner] as a civil trial advocate" and was "tantamount to a claim of superiority by those attorneys who are certified [over Illinois-licensed practitioners not so certified]." *Ibid.*

Later in its opinion, the court agreed with the concern of an ABA committee that "the terms 'specialist' or 'practices in a specialty' or 'specializes in' particular fields have acquired a secondary meaning implying formal recognition as a specialist and [that] use of these terms is misleading, except in States which provide procedures for such certification." Pet. App. 13a. The court was particularly concerned because the certification statement "was used on [petitioner's] letterhead in conjunction with information about official licensures in Illinois, Missouri and Arizona." *Ibid.*⁸

⁸ In response to petitioner's equal protection claim, the Illinois Supreme Court distinguished between admiralty, patent, and trademark lawyers, who are permitted to advertise themselves as specialists under Disciplinary Rule 2-105, and lawyers engaged in any other type of practice, who are not allowed to advertise themselves as specialists. In the court's view, the distinction rested on the notion that "allowing attorneys practicing in admiralty to advertise their specialties in no way implies that the admiralty attorney is more capable than any other admiralty attorney because all such attorneys may advertise the fact [of their specialization in admiralty law]." Pet. App. 14a. In addition, the court noted that, historically, clients in need of counsel on patent, trademark, and admiralty law found it difficult to locate attorneys engaged in these practice areas; "locating an attorney who is a civil trial advocate would not involve the same difficulty," especially when Rule 2-105 permits them to represent their practices as "limited to" or "concentrated in" a particular area of law. *Ibid.*

SUMMARY OF ARGUMENT

Statements describing the professional qualifications of an attorney on his business letterhead constitute commercial speech. On the present record, the State's categorical prohibition of all certification and specialization claims violates the standards governing regulation of commercial speech under the First Amendment.

1. Petitioner's contention that his certification claim is not commercial speech and cannot be regulated as such is, in all likelihood, not properly presented for review. The briefs filed by the parties in the court below, as well as the opinion of the state court, reveal that the proper categorization of petitioner's speech was neither pressed nor passed on by the Illinois Supreme Court. Accordingly, this Court should decline to consider the issue on the merits.

To the extent the categorization issue is properly presented, petitioner's letterhead certification claim plainly should be regarded as commercial speech. Contrary to petitioner's theory, this Court's statement that the "core notion of commercial speech" is " 'speech which does "no more than propose a commercial transaction," ' " *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citing cases), does not exhaust the definition of commercial speech. Instead, the Court's decisions indicate that commercial speech also encompasses (1) implicit proposals for commercial transactions and (2) speech integrally related to such transactions, especially where the speaker has a financial interest in the transaction.

In this case, petitioner's certification claim is both an implicit proposal for a commercial transaction and speech integrally related to one. First, petitioner's certification claim is a representation about the type and quality of the services he has to offer; as such, it contributes to the beliefs consumers form about his services and enhances their propensity to retain him. The fact that petitioner's

certification claim is directed at fellow practitioners and existing clients rather than new clients does not negate the commercial nature of his message, which remains designed to generate new referrals and continued patronage of existing clients. Second, petitioner's certification claim is integrally related to commercial transactions in which petitioner has a direct financial interest. Like the paid-for speech of a debt collector or credit bureau, petitioner's letterhead certification claim effectuates purely business transactions and is therefore regulable as commercial speech.

2. On this record, the State's absolute prohibition of truthful certification and specialization claims by attorneys violates the First Amendment. Such communications, like other forms of protected commercial speech, facilitate the proper functioning of a market economy by providing consumers with information about the nature and quality of services available from competing practitioners. Although Illinois may protect consumers from false or misleading commercial speech, the State has not demonstrated that certification and specialization claims, which are entirely prohibited by its rule, are inherently misleading.

In addition, this Court's decisions establish that States may not absolutely entirely prohibit truthful commercial speech unless the State makes some demonstration that any potential injury cannot be cured through a more narrowly drawn regulation. In this case, the State may not enact a prophylactic prohibition of all claims of specialization or certification without giving careful consideration to the cost imposed by its absolute ban and to obvious, narrowly drawn alternatives for accomplishing the state interest.

ARGUMENT

I. PETITIONER'S STATEMENT ON HIS BUSINESS LETTERHEAD THAT HE IS A CERTIFIED CIVIL TRIAL SPECIALIST CONSTITUTES COMMERCIAL SPEECH

A. Petitioner's contention that his certification claim is not commercial speech and cannot be regulated as such is, in all likelihood, not properly presented for review by this Court. As we read the briefs filed by the parties in the court below, as well as the opinion of the Illinois Supreme Court, we agree with respondent that the question of the proper categorization of petitioner's speech was neither argued to nor addressed by the Illinois Supreme Court. See Br. in Opp. 11. Petitioner's federal constitutional challenge is therefore raised here for the first time.

With rare exceptions, this Court refuses to "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969). This rule rests on two considerations, both of which are implicated in this case. First, "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale*, 394 U.S. at 439. In this case, the slim record provides little information bearing on the uses petitioner made of his letterhead, which might affect the proper categorization of his certification claim for First Amendment purposes. Second, "due regard for the appropriate relationship of this Court to state courts requires * * * this Court * * * [to] refus[e] to consider any grounds of attack not raised or decided in" the state court. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). Here, although the Illinois Supreme Court applied commercial speech precedents, see Pet. App. 6-8, there was never "any real contest at any stage of this case upon the point," *Morrison v. Watson*, 154 U.S. 111, 115 (1894),

such as would allow the Illinois Supreme Court to pass on this question.

To be sure, petitioner vigorously maintained both in the proceedings before the ARDC and in the Illinois Supreme Court that the certification statement appearing on his letterhead was protected speech under the First Amendment. And in resolving this claim, the state court necessarily decided, albeit only implicitly, that the appropriate standard of review was that applied in assessing regulations of commercial speech, as opposed to non-commercial speech. Thus, it could be argued that the question of the proper categorization of petitioner's speech is "only an enlargement of the one mentioned in the assignment of errors" below. *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899). See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972) (*Cardinale* rule is "fully observed" when the case is disposed of "on the constitutional premise raised below" (in that case, the Equal Protection Clause), even though the Court arguably employed a different type of equal protection argument than that raised in the state court). Nevertheless, petitioner's contention that his letterhead statement was fully protected speech is distinct from the contention advanced and passed on below—i.e., that his statement should be protected *as* commercial speech. Accordingly, we believe that this Court should decline to review the categorization issue in this case. Cf. *Illinois v. Gates*, 462 U.S. 213 (1983).

B. To the extent that the categorization issue is properly presented, petitioner's letterhead certification claim should plainly be regarded as commercial speech. Although the "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction,'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 66 (citing cases), the Court has never suggested that proposals of transactions exhaust the defini-

tion of commercial speech.⁹ Instead, this Court's decisions demonstrate that commercial speech is not limited to express proposals but also includes (1) implicit proposals for commercial transactions and (2) speech integrally related to a commercial transaction, particularly when the speaker has a financial interest in promoting the product or service that is the subject of the transaction.

1. That implicit as well as explicit proposals for commercial transactions constitute commercial speech is illustrated by *Friedman v. Rogers*, 440 U.S. 1 (1979). In *Rogers*, the Court held that an optometrist's use of a trade name was a form of commercial speech. Of course, a trade name by itself does not explicitly invite the purchase of a product or service. However, like the pharmacist who wishes to advertise his prices, considered in *Virginia Pharmacy Board*, an optometrist using a trade name

"does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report

⁹ If "commercial speech" were synonymous with "proposals of commercial transactions," the various terms of a commercial contract would receive the same measure of constitutional protection as political expression. In addition, a definition of commercial speech this limited would imply, contrary to this Court's precedents, that full First Amendment protection must be afforded to "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (citations omitted), as well as labor picketing designed to encourage a secondary boycott, *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980), and efforts to persuade a private standard-setting organization to exclude a competitor's product, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988). Needless to say, none of those types of expression merits the same degree of protection as political dialogue and commentary. But cf. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 109 S. Ct. 3028, 3036 (1989) ("speech that *proposes* a commercial transaction * * * is what defines commercial speech").

any particularly newsworthy fact, or to make generalized observations even about commercial matters." [*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 761 (1976).] His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.

Id. at 11. The solicitation of business implicit in the use of a trade name should be apparent. Once a trade name has been employed by a business for some time, it serves both to identify that business and "to convey information about the type, price, and quality of services offered for sale." *Ibid.* In this way, the trade name is "part of a proposal of a commercial transaction." *Ibid.*¹⁰

Speech integrally related to a commercial transaction is likewise regulable as commercial speech, especially where the speaker has a financial interest in promoting the transaction. Thus, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a plurality of the Court concluded that, although the expression at issue (financial reports prepared by a private credit reporting agency about private firms) did not constitute economic or commercial speech, "many of the same concerns that argue in favor of reduced constitutional protection in

¹⁰ The Court reached the same result in *Youngs Drug Products*. In that case, the Court held that a contraceptive manufacturer's informational pamphlets were commercial speech, 463 U.S. at 66-68, even though they did not explicitly propose a commercial transaction, *id.* at 63 n.4. Without labeling it so, the Court found that the informational pamphlets, which discussed family planning and venereal disease, implicitly proposed a commercial transaction by either "specifically refer[ing] to a number of [the firm's] condoms * * * and describ[ing] the advantages of each type" or by "refer[ing] to [its products] generically," when it had a large market share and could be expected to benefit from promotion "without reference to its own brand names." *Id.* at 66-67 n.13.

those areas apply here as well." *Id.* at 762 n.8. Relying upon the Court's commercial speech decisions, the plurality found that the credit reports could be regulated for their accuracy for several reasons: they communicated information of interest solely to the credit reporting agency and its specific business audience; they were distributed to a limited audience; like advertising, they were unlikely to be chilled by incidental state regulation, since they were created for profit; they were arguably more objectively verifiable than other forms of speech; and finally, they were likely to be influenced by market forces. See *id.* at 762-763.

Speech that either implicitly solicits a commercial transaction or is integrally related to one serves an identical function to speech that explicitly proposes a commercial transaction. All three forms of speech are valued principally for the "facts" they convey. In contrast, discussion of governmental affairs, which lies "at the heart of the First Amendment's protection," *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); see *Boos v. Barry*, 108 S. Ct. 1157, 1162 (1988), is valued less for its factual content than for its political and ideological expression. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 779 (Stewart, J., concurring). Proposals for commercial transactions and speech integrally related to them share other identifying characteristics. Factual representations contained in each of these forms of speech are "easily verifiable," the speaker "presumably knows more * * * than anyone else" about the subject matter, and in each case the speech is "more durable than other kinds" of speech, because of the financial motivations of the speaker. *Id.* at 772 n.24. Consequently, because of the "greater objectivity and hardiness" of these forms of speech, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Ibid.*

2. In this case, petitioner's claim that he is a "certified civil trial specialist," appearing in the context of the letterhead on his business stationery, should be regarded as an implicit solicitation of a commercial transaction. Petitioner's statement is a claim by one engaged in the provision of legal services about the "type * * * and quality of services" he has to offer. *Friedman v. Rogers*, 440 U.S. at 11.¹¹ Like product or service claims generally, petitioner's claim contributes to the beliefs consumers form about his services and enhances their propensity to retain him. Like the commercial trade name in *Rogers*, then, the claim made on petitioner's business letterhead is "a form of commercial speech and nothing more." *Ibid*.

That petitioner does not use his letterhead stationery to solicit new clients directly does not alter the analysis. By restricting use of his stationery to current clients and fellow attorneys, petitioner has simply chosen a more subtle way to solicit commercial transactions. Petitioner, like many attorneys who do not overtly advertise their services, "must rely on his contacts with the community to generate a flow of business." *Bates v. State Bar*, 433 U.S. 350, 378 (1977). Indeed, "referrals by other lawyers constitute a substantial portion of petitioner's legal business." Pet. 17. Petitioner's letterhead claim helps build his reputation as a civil litigator, and consequently helps petitioner secure new business from fellow attorneys and from existing clients, who may refer to him persons in need of a civil trial lawyer. In addition, current non-litigation clients may bring litigation matters to petitioner to avail themselves of his implied prowess in the courtroom. And even if the certification claim adorning petitioner's letterhead does not contribute new business, it may nonetheless ensure his cur-

¹¹ For example, petitioner's letterhead describes the location of his office, the colleague who practices with him, the States in which each is licensed to practice, and the fact that petitioner is a certified civil trial specialist by the NBTA. Pet. App. 21a.

rent clients' continuing satisfaction with his performance and retention of his services.¹² While less overtly commercial than a public advertisement, petitioner's letterhead claim is functionally equivalent to more explicit forms of solicitation and merits no more protection under the First Amendment.

Petitioner maintains that to treat his letterhead claim as commercial speech because of its potential to generate referrals would sow confusion among attorneys, who would fear regulation whenever they participated "in bar association and civic activities * * * motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise." Pet. 17. The use of a letterhead that touts the attorney's professional qualifications, however, is not merely incidental to some broader communicative purpose that might properly be accorded greater First Amendment protection than that given commercial speech. Petitioner's letterhead certification claim is "strictly business." *Friedman v. Rogers*, 440 U.S. at 11.

Even if petitioner's letterhead were not used in any way to solicit or retain business, it is nonetheless speech integrally related to commercial transactions in which petitioner has a direct financial interest, and is therefore

¹² The Commission's experience under its Trade Regulation Rule on Mail Order Merchandise, 16 C.F.R. 435.1, provides a useful analogy. That Rule regulates both claims used by mail order merchandisers to induce consumers to purchase a product, and claims made by the merchandisers concerning subsequent aspects of the transaction. The latter types of claims (regarding, among other things, when a product will actually be shipped and why any shipping delay has occurred), may be used to persuade the consumer not to withdraw from a transaction he or she has already entered. See also Fair Credit Billing Act, 15 U.S.C. 1666 (regulating statements made by credit card issuer regarding consumers' obligation to pay disputed billing charges).

regulable as commercial speech. Consider in this regard a letter demanding settlement of a personal injury claim, payment of an alleged debt, or some other concession from its recipient. Particularly if that recipient is a layman, such a letter may well strike with greater force if sent on stationery that proclaims that its author is no stranger to the courtroom. This form of speech, like speech that proposes a commercial transaction, has value only if it is truthful, and no broader goals of free expression are impaired by requiring it to be accurate.

Congress has expressly recognized the threat posed by the deceptive and harassing speech that is sometimes used to collect debts, and has regulated such speech in the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692. That Act prohibits anyone acting as a "debt collector" (including attorneys) from making "any false, deceptive, or misleading representation * * * in connection with the collection of any debt." 15 U.S.C. 1692e. The Commission is empowered to remedy violations of the FDCPA "as if the violation had been a violation of a Federal Trade Commission trade regulation rule." 15 U.S.C. 1692l(a).

In other situations as well, Congress has regulated the accuracy of speech which effects commercial transactions (and hence is integrally related to such transactions), even though such speech does not propose a commercial transaction. For example, the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, imposes rules to ensure the accuracy of consumer credit reports. To ensure that the "speech" sold by credit reporting agencies is accurate, the Act requires any agency preparing such a report to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b). A violation of the FCRA "shall constitute an unfair or deceptive act or practice * * * and shall be subject to enforcement by the Federal Trade Commission." 15 U.S.C. 1681s(a). See, e.g., *Trans Union Credit Information Co.*, 102 F.T.C. 1109 (1983).

We recognize, of course, that much for-profit speech (e.g., the paid-for articles of a journalist) is not commercial speech. See *Board of Trustees of the State Univ. of N.Y. v. Fox*, *supra*; *Riley v. National Federation of the Blind*, 108 S. Ct. 2667, 2677 (1988). Cf. *Bolger v. Youngs Drug Products Co.*, 463 U.S. at 67 n.14 ("Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment."). Still, some "paid-for" speech, such as that of the debt collector or the credit bureau regulated by the statutes discussed above, is clearly so integrally related to purely business transactions that it must be subject to regulation as commercial speech. This is especially true where the speaker has a direct financial interest in a commercial transaction (as does the debt collector), or develops and sells the information solely for use in a commercial transaction (as does the credit bureau).

II. A BAN ON ALL TRUTHFUL REPRESENTATIONS OF PROFESSIONAL SPECIALIZATION OR CERTIFICATION IS IMPERMISSIBLE ON THIS RECORD UNDER THE FIRST AMENDMENT

Although the First Amendment provides less protection to commercial speech than to political expression, the decisions of this Court recognize the important function that commercial speech serves in a market economy. In *Virginia Pharmacy Board v. Virginia Consumers Council*, the Court observed that the free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system." 425 U.S. at 765. Accord, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-562 (1980). Commercial information enables consumers to make better-informed judgments in procuring the services of professionals, *Bates v. State Bar*, 433 U.S. 350, 364 (1977), and facilitates the use of professional services by consumers who otherwise would not find or use professionals at all, *id.* at 370; see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 646.

A. Consumers Benefit From the Information Conveyed by Certification

The relationship between professionals who provide services and the consumers who purchase those services is often characterized by asymmetric information.¹³ Many professionals provide services that require highly specialized, technical expertise. For their part, consumers generally lack the information and repeat purchase experience needed to evaluate the quality of professional services. For example, an unsuccessful litigant may be unable to determine whether he lost because his case lacked merit or because his lawyer was incompetent. Similarly, a patient who fails to recover from an illness may be unable to determine whether the treatment's failure reflects the limitations of medical science or those of her doctor.

Voluntary certification is a market response to this informational asymmetry. By signifying that the professional's qualifications satisfy some objective standard, legitimate certification mechanisms facilitate consumers' differentiation of professionals "between those who possess certain desired characteristics and those who do not." W. Gellhorn, *Individual Freedom and Government Restraints* 147 (1956). See A. Wolfson, M. Trebilcock & C. Tuohy, *Regulating the Professions: A Theoretical Framework in Occupational Licensure and Regulation* 203 (S. Rottenberg ed 1980). Examples of voluntary certification are familiar to virtually every consumer. The Good Housekeeping Seal and the Underwriter's Laboratories emblem certify many products.¹⁴ In the area of profes-

¹³ See A. Wolfson, M. Trebilcock & C. Tuohy, *Regulating the Professions: A Theoretical Framework in Occupational Licensure and Regulation* 180, 190-91 (S. Rottenberg ed. 1980) [hereinafter Rottenberg]; Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. Pol. Econ. 1328 (1979); H. Leland, *Minimum-Quality Standards and Licensing in Markets with Asymmetric Information*, in Rottenberg 265; S. Young, *The Rule of Experts: Occupational Licensing in America* 15-17 (1987).

¹⁴ As this Court recently observed, the promulgation of product standards by private organizations "through procedures that prevent

sional services, medical boards certify practitioners in most medical specialties. Less formally, employers often rely on certification in selecting their employees. For example, a law firm that recruits associates only from the ranks of selected law schools is effectively using the law schools as certification organizations.¹⁵

Professional certification can thus help consumers predict the nature of the services available from various practitioners.¹⁶ As the Alabama Supreme Court observed in holding unconstitutional a total ban on attorneys' truthful representations of certification, "[i]t would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge and skills with regard to any area of legal practice." *Ex parte Howell*, 487 So. 2d 848, 851 (Ala. 1986). Certification mechanisms may provide a useful means for consumers to overcome informational shortcomings that obscure differences in the experience, knowledge, and skills of practitioners.

Consumers are best served by certification programs when certification represents an objective measure of a pro-

the standard-setting process from being biased by members with economic interests in stifling product competition * * * can have significant procompetitive advantages." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. at 1937.

¹⁵ Even a department store may act as a certification body by certifying the quality of the products it sells. M. Friedman, *Capitalism and Freedom* 146 (1962). See also Marvel & McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & Econ. 363, 369 (1985).

¹⁶ The information provided by certification of professionals is necessarily predictive because it assumes a correlation between measured inputs, such as the practitioner's training and experience, and output. Such predictions are by necessity imperfect. Some who have attained certification are likely to provide lower quality services than some who have not. See A. Wolfson, M. Trebilcock & C. Tuohy in Rottenberg 204. The same may be said for virtually any form of certification. For example, academic achievement is an imprecise predictor of job performance but it is nonetheless used by those employers who find its predictive benefits to outweigh the costs of its imprecision.

professional's performance that is relevant to the services the professional provides. Absent these conditions, claims of certification may indeed be deceptive. It is not difficult to imagine "diploma mills" that certify any practitioner willing to pay the requisite fee. Claims of certification may also be misleading to consumers when the professional is certified in a field that is not relevant to the services he offers. For these reasons, government regulation of professionals' certification claims may be appropriate to prevent or cure deception.¹⁷ As discussed below, the two States other than Illinois to consider the issue in a litigated setting have opted for regulation of certification programs, rather than altogether banning certification claims, as Illinois has done.

B. In Light of the Present Record, the Illinois Rule Prohibiting Any Reference to Specialization or Certification Violates the First Amendment

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. See *Bates v. State Bar*, 433 U.S. at 384. The Court has also protected truthful statements announcing the availability of legal services. See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1917 (1988) (mass mailing "to potential clients who have had a foreclosure suit filed against them"). Those protections for speech concerning the affordability and availability of legal services are in-

¹⁷ The Commission has taken enforcement action against organizations that grant certifications without adequately evaluating the products they approve. See *National Ass'n of Scuba Diving Schools, Inc.*, 100 F.T.C. 439 (1982) (consent order barring organization from issuing seals of approval without conducting tests to determine whether products meet an objective standard of quality or performance); *Hearst Magazines, Inc.*, 32 F.T.C. 1440 (1941) (order prohibiting issuance of seals of approval without sufficient testing to assure that products fulfilled claims made about them). Cf. *Ohio Christian College*, 80 F.T.C. 815 (1972) (false claim that college's accrediting organization was "a recognized bona fide accrediting agency").

complete without similar protection for speech concerning the ability of the professionals rendering such services.¹⁸ Under the Court's framework for analyzing state regulation of commercial speech, the Illinois Supreme Court's flat prohibition of any claims of certification or specialization violates the First Amendment.

The Court's general approach for determining the constitutionality of restrictions on commercial speech, including "the commercial speech of attorneys," is "well settled." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 638. Accord, *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1921; *In re R. M. J.*, 455 U.S. 191, 203 & n.15 (1982). The applicable test is that set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity"; if the communication meets that threshold test, it may then be restricted only if (1) the government asserts a substantial interest to be achieved by the restrictions, (2) the restrictions directly advance the government's asserted interest, and (3) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Ibid.*

1. *Because the State Has Failed To Demonstrate That A Truthful Statement of Professional Specialization Or Certification Is Inherently Misleading, Petitioner's Letterhead Claims Are Entitled To Protection Under The First Amendment*

The initial question posed by *Central Hudson* is whether the communication at issue is either inherently misleading

¹⁸ "Although the system may have worked when the typical lawyer practiced in a small, homogenous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy. * * * The trends of urbanization and specialization long since have moved the typical practice of law from its small-town setting. * * * Information as to the qualifications of lawyers is not available to many. * * * And if

or relates to unlawful activity, in which case it may be prohibited entirely. There is no question of the lawfulness of the certification at issue in this case. The Illinois Supreme Court determined, however, that the petitioner's truthful representation of NBTA certification on his letterhead was "inherently misleading." Pet. App. 7a (quoting *In re R. M. J.*, 455 U.S. at 203); Pet. App. 11a. The gist of the Illinois Supreme Court's concern was that, in the minds of the public, the NBTA's voluntary certification of trial advocates would be confused with the State's mandatory licensing of attorneys to practice law.

However, it is highly unlikely that an attorney's truthful representation that he has been certified by the *National Board of Trial Advocacy* would mislead the public to believe that his certification constituted some kind of state license to practice law. In explanation of its hypothesis, the court relied on "the similarity between the words 'licensed' and 'certified'." Pet. App. 9a. The court documented this assertion with a highly edited quotation of a dictionary definition of the word "certificate." According to the state court:

Webster's dictionary defines 'certificate' as 'a document containing a certified and usually official statement . . . , especially, : a document issued by . . . a state agency . . . certifying that one has satisfactorily . . . attained professional standing in a given field and may officially practice or hold a position in that field.'

Ibid. (quoting *Webster's Third New International Dictionary* 367 (1986) (omissions and emphasis in original)). In fact, the last portion of the sentence modified by the state court reads as follows in the original:

[A] document issued by a school, a state agency, or a professional organization certifying that one has

available, it may be inaccurate or biased." *Bates v. State Bar*, 433 U.S. at 374-375 n.30.

satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field and may officially practice or hold a position in that field.

Webster's Third New International Dictionary 367 (1986). Thus, the authority relied upon by the state court rebuts the State's contention that the terms "certificate" and "license" are coextensive. Although that dictionary identifies an official sanction to practice a profession as one meaning of "certificate," it gives as an equally valid meaning the one used by petitioner—a document issued by a professional organization certifying that one has attained certain professional qualifications. In addition, "certificates" that do not constitute official state documents, such as those given for superior job performance or attendance in seminars, are sufficiently common to suggest that claims that a person is "certified" will not automatically be equated with mandatory licensure by the State.¹⁹

The Illinois court's narrower contention—that petitioner's claim of specialization in a particular field falsely implies that he has been formally recognized as a specialist by the State—is also not self-evident.²⁰ *Webster's Third New International Dictionary*, the principal authority

¹⁹ The literature on this subject draws a sharp distinction between mandatory licensure and voluntary certification. See, e.g., M. Friedman, *supra*, at 144-149; S. Young, *supra*, at 18-19.

²⁰ The Illinois Supreme Court took judicial notice of a draft report of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. The report said that the term "specialty" had "acquired a secondary meaning implying formal recognition as a specialist." Pet. App. 13a. The recommendations of the draft report, to which the Illinois Supreme Court attached great weight, have since been adopted by the ABA House of Delegates. The report evidently equates "formal" recognition—which the petitioner in this case plainly possesses—with state recognition, for it concludes that a truthful claim of specialization is misleading except in States "which provide procedures for certification or recognition of specialization." *Ibid.* The report does not describe the evidentiary basis for the ABA committee's conclusions.

relied on by the state court, does not even suggest in its definition of "specialist" that the word implies state licensure. *Webster's Third New International Dictionary* 2186 (1986). Medical specialties are commonly recognized by private, voluntary boards,²¹ and research reveals no State that formally licenses medical specialists.²² Moreover, one can readily think of numerous other claims of specialty—from "air conditioning specialist" in the realm of home repairs to "foreign car specialist" in the realm of automotive repairs—that cast doubt on the notion that the public would automatically mistake a claim of specialization for a claim of formal recognition by the State. Indeed, the Illinois Supreme Court by rule permits trademark lawyers to hold themselves out as "Trademark Lawyer[s]," Pet. App. 2a, and the court expressed no concern in its opinion that claims of specialization in the trademark area imply formal state recognition of that specialty.

Neither of the two other state supreme courts to consider the issue in a litigated setting even suggested that truthful statements of certification or specialization could be mistaken for state licensing. See *Johnson v. Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983); *Ex parte Howell*, 487 So.2d 848 (Ala. 1986). Of course, when "the possibility of deception is * * * self-evident," the State "need not require * * * a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *FTC v. Colgate-Palmolive Co.*, 380 U.S. [374,] 391-392 [(1965)]." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at

²¹ See F. Campion, *The AMA and U.S. Health Policy Since 1940*, at 32 n.*, 435-440 (1984).

²² See F. Grad & N. Marti, *Physicians' Licensure & Discipline* 81 (1979) ("Unlike state licensure of the practice of medicine generally, medical specialization is supervised by independent specialty boards, which are private, non-profit organizations without any governmental authority"). See generally *id.* at 81-83.

652-653. But when the State's theory of deception is as dubious as it is in this case, the State should be required to present some evidence to support a claim of deception before it may promulgate an across-the-board prohibition of an entire class of representations.²³

The state's final basis for finding certification claims to be inherently misleading is that such a statement "is tantamount to a claim of superiority by those attorneys who are certified." Pet. App. 9a. Although certification does convey a message that the professional possesses an attribute that some consumers may find desirable, it is not a statement that the professional is a superior practitioner to those who do not possess that attribute.²⁴ Indeed, the Il-

²³ In reviewing determinations by the Federal Trade Commission that a practice is "deceptive" within the meaning of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), this Court has recognized that "the words 'deceptive practices' set forth a legal standard and * * * must get their final meaning from judicial construction," but that "the Commission's judgment is to be given great weight by reviewing courts," particularly because "the finding of a [section] 5 violation in this field rests so heavily on inference and pragmatic judgment." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

The deference accorded FTC determinations stems, in part, from this Court's recognition that "as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *FTC v. Colgate-Palmolive*, 380 U.S. at 385. See, e.g., the Commission's elaboration of the legal standards for determining deception in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-166 (1984). Whether comparable deference is due the determinations of a state body may, therefore, depend upon the identity and functions of that body. Cf. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 659 n.3 (opinion of Brennan, J.) ("In evaluating the necessary form and content of disclosure, courts of course should be guided by the 'enlightenment gained from administrative experience * * *'). Here, the State's implausible theory of deception would not survive even the deferential review applied to FTC determinations that a practice is deceptive.

²⁴ Claims of a desirable attribute are common in product advertising. While claims that a detergent contains a whitener, that a tire is steel-belted, or that an automobile is equipped with antilock brakes

Illinois court's equation of a claim of a desirable attribute with a superiority claim proves too much. Under the court's logic, a truthful claim that an attorney concentrates in real estate law or that an optometrist is trained in fitting patients with extended wear contact lenses could be altogether proscribed on the ground that consumers might construe such statements to claim superiority over professionals who do not advertise.²⁵ Just as in *Zauderer v. Office of Disciplinary Counsel*, where the attorney advertised that he "had represented other women in Dalkon Shield litigation—a statement of fact not in itself inaccurate," 471 U.S. at 640 n.9, the State's defense that its restriction on the advertisement was "an allowable restriction * * * [of a claim] of asserted expertise," *ibid.*, is quite "beside the point," *ibid.* "Although [the Court's] decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services, see *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977), they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Ibid.* (citation omitted). Unless the claim that the professional possesses the specified attribute is deceptive for some other reason,²⁶ it is entitled to First Amendment protection.

convey the message that the products possess a desirable attribute, they do not convey the message that the products are superior to all competing products.

²⁵ Under the Illinois court's logic, a physician could be prohibited from advertising board certification.

²⁶ Compare *In re R. M. J.*, 455 U.S. at 205 (truthful statement of admission to Supreme Court Bar "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court," presumably because it may falsely imply that such admission requires special expertise) with *Ex parte Howell*, 487 So.2d at 851 (NBTA certification "indicate[s] a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally").

The State has failed to provide a colorable basis for concluding that it is inherently or inevitably²⁷ misleading for petitioner to state on his letterhead that he has been certified as a civil trial specialist by the NBTA. Even if such a claim had the potential to be misleading, however, it would not be bereft of constitutional protection. The decisions of this Court make clear that while States may ban misleading commercial speech entirely, they "may not place an absolute prohibition on certain types of potentially misleading information * * * if the information also may be presented in a way that is not deceptive." *In re R. M. J.*, 455 U.S. at 203. Accordingly, if petitioner's otherwise truthful certification claim were misleading, the State could still not ban the claim entirely if it could be presented in such a way as to be neither deceptive nor misleading. This possibility is explored in the next section.

2. *A Prophylactic Ban On All Truthful Claims Of Professional Specialization Or Certification Is Broader Than Reasonably Necessary To Advance Any Demonstrated State Interest In This Case*

Because petitioner's certification claim is neither unlawful nor inherently misleading, the question whether it may be prohibited must be determined by means of the final three elements of the *Central Hudson* inquiry—namely, whether Illinois's interest is substantial, whether its disciplinary rule advances that interest, and whether its rule is no broader than is reasonably necessary. Although the State has the burden of justifying its restrictions, *Board of Trustees of the State Univ. of N.Y. v. Fox*, 109 S. Ct. at 3034-3035, the Illinois Supreme Court did not address these issues in light of its determination that any claim of certification or specialization is inherently misleading and can thus be prohibited entirely. Measuring

²⁷ See *In re R. M. J.*, 455 U.S. at 202 ("necessarily or inherently misleading") *Bates v. State Bar*, 433 U.S. at 372 ("inherently" or "inevitably" misleading).

Illinois's disciplinary rule against the dictates of the Constitution as articulated by *Central Hudson*, it is clear that the state rule sweeps far too broadly.

As to the first element of the *Central Hudson* test, the State of Illinois unquestionably has a substantial interest in ensuring that representations concerning specialization or certification are not used to deceive consumers.²⁸ The Illinois Supreme Court also asserted a substantial state interest in protecting the State's licensing powers by preventing confusion between voluntary private certification and its own mandatory licensing. Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

With respect to the second element of the test, however, those interests are only partly advanced by Illinois's disciplinary rule. Obviously, an absolute ban on all certification and specialty claims advances the State's interest of ensuring that such communications do not mislead consumers—an absolute ban on speech unquestionably bars misleading (as well as truthful) speech. But although the State also has a valid interest in preventing the confusion of private certification with its own licensing mechanisms, the preceding section demonstrated that there is no basis either in common sense or in evidence for concluding that such confusion in fact exists. Therefore, the ban cannot be held to advance that interest.

The last question posed by *Central Hudson* is whether the restrictions are more extensive than is necessary to achieve the State's interests. As the Court explained in *Board of Trustees of the State Univ. of N.Y. v. Fox*, while this last prong of the *Central Hudson* test does not require

²⁸ Although the Illinois Supreme Court did not articulate this interest, the two other state supreme courts to have considered the issue have expressed the concern that permitting statements of certification to be made "might spawn spurious certifying organizations whose certifications would be meaningless," *Ex parte Howell*, 487 So. 2d at 851, or mislead "an uninformed public by claims of specialization and quality of services," *Johnson v. Director of Professional Responsibility*, 341 N.W.2d at 285.

the State to use the least restrictive means to achieve its interests, it does require the State to employ "a means narrowly tailored to achieve the desired objective." 109 S. Ct. 3035.

Because, as demonstrated above, truthful claims of certification or specialization are not inherently misleading, they plainly can be presented in ways that are not deceptive. It follows that such claims cannot be entirely forbidden unless the State can show that the prohibition adopted is not disproportionate to the state interest served. *In re R. M. J.*, 455 U.S. at 203. See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1924; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 646. In this case, the State has adopted a prophylactic ban on all truthful statements concerning specialization or certification without considering more narrowly tailored means of achieving its purpose. For example, insofar as the State is concerned that the public will rely on claims of certification from spurious organizations, it might promulgate rules for approving certifying organizations. That solution was adopted by the two other state supreme courts that have considered the issue. *Johnson v. Director of Professional Responsibility*, 341 N.W.2d at 285; *Ex parte Howell*, 487 So.2d at 851.²⁹ If confusion of private certifications with state licenses were shown to be a problem, the State could require disclosure of the private nature of the certification, or could require placement of the certification claim away from the listing of States in which

²⁹ The Illinois Supreme Court's observation that the state had "not provided for any procedure for formal recognition of specialists in the practice of law," Pet. App. 13a-14a, fails to satisfy the First Amendment's requirement that the State "carefully calculate[]" the cost that its regulation would impose, *Board of Trustees of the State Univ. of N.Y. v. Fox*, 109 S. Ct. at 3035. The court did not consider either the costs that its absolute prohibition imposes, or the practicability of adopting certain obvious, narrowly-tailored means for accomplishing its objectives, such as a state recognition procedure.

the attorney is licensed to practice law.³⁰ In keeping with this Court's directive that restrictions on commercial speech be in proportion to the state interest served, however, a total ban on truthful representations is disproportionate to the risk of deception through spurious certification. "[T]he free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. at 1924 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 646).

³⁰ The cure for such potential deception would lie not in barring the representation but in "requir[ing] a statement explaining the nature of" the certification. *In re R. M. J.*, 455 U.S. at 205. Cf. *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. at 1923 (total ban of potentially abusive communications improper where State can review communications and punish wrongdoers); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 644-647 (total ban of solicitation of legal employment through advertising improper since State can punish lawyers who publish deceptive advertisements); *id.* at 651 ("[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." (citations omitted)); *In re R. M. J.*, 455 U.S. at 201 ("the preferred remedy is more disclosure, rather than less"); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) ("[T]he remedy to be applied is more speech, not enforced silence." (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))).

CONCLUSION

For the foregoing reasons, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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